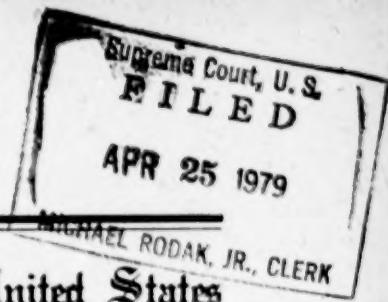


No. 78-1359



In the Supreme Court of the United States

OCTOBER TERM, 1978

FERIDUN GUNDUY, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT*

MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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**MEMORANDUM FOR THE UNITED STATES
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Petitioner contends that since he is a licensed physician, he was improperly prosecuted under 21 U.S.C. 841(a)(1) for aiding and abetting illegal distribution of controlled substances.

1. After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiracy to possess and distribute a Schedule II controlled substance, in violation of 21 U.S.C. 846 (Count 1); aiding and abetting the illegal possession, with intent to distribute, and the distribution, of a controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Counts 3 and 4); knowingly omitting material information from and furnishing fraudulent information in documents required to be kept under 21 U.S.C. 827(a), in violation

of 21 U.S.C. 843(a)(4) (Counts 5, 6, and 8); and obstruction of justice, in violation of 18 U.S.C. 1503 (Count 9).¹ Petitioner was sentenced to concurrent terms of 18 months' imprisonment on each count, a special parole term of five years, a fine of \$15,000 on each of Counts 1, 3, 4, 5, 6 and 8, and a fine of \$5,000 on Count 9. The court of appeals affirmed (Pet. App. 1a-2a).

On the evening of April 13, 1976, Eugene Biscardi was arrested by Drug Enforcement Administration (DEA) agents, following his sale of 5,000 Delcobese amphetamine capsules to Richard Rubin, a pharmacist who was then acting as a government agent (A. 405).² At the time of Biscardi's arrest it was determined that he was an employee of petitioner, who was a medical doctor (A. 394). On the morning following Biscardi's arrest, several DEA agents began a routine investigation of petitioner's business records (A. 236, 802).³

The investigation disclosed that petitioner maintained two offices for the treatment of obesity (A. 36, 195). He employed a number of physicians who saw and treated 1,400 patients weekly; 75 percent of the patients were receiving Delcobese (A. 153, 548). Rather than going to a pharmacy, petitioner's patients received these drugs at petitioner's offices. The

¹Although petitioner was found guilty on all nine counts of the indictment, the district court subsequently dismissed Counts 2 and 7.

²"A." refers to the Appendix on appeal.

³No evidence was elicited at trial suggesting that petitioner participated in or was even aware of Biscardi's street distributions.

examining physician would fill out an inter-office memo stating the amount of medication, and the patient would present this at the dispensing desks and receive the medication (A. 197, 201).

Biscardi was employed by petitioner to see and treat patients. The testimony at trial established that petitioner's employees, as well as his patients, regarded Biscardi as a medical doctor (A. 147-149, 196, 201, 475, 501-504), and that petitioner told them that Biscardi was a physician (A. 504). Biscardi prescribed Delcobese (A. 201, 502, 908-910) and even had his own patients, who routinely asked for him and were treated by him with Delcobese (A. 204). Biscardi was not licensed to practice medicine, however, nor was he registered to prescribe Delcobese (A. 787), and petitioner knew this (A. 911-912). Petitioner's actions in assisting Biscardi's unauthorized dispensing of controlled substances through petitioner's practice was the basis of Counts 1, 3 and 4 of the indictment.⁴

2. Relying on *United States v. Moore*, 423 U.S. 122 (1975), petitioner contends (Pet. 5-7) that a medical doctor can be convicted under 21 U.S.C. 841(a)(1) only if he "uses his profession as nothing more than a front for his illegal activities" (Pet. 6). He argues (*ibid.*) that since he "possessed an extensive, highly successful, legitimate medical practice," he cannot be prosecuted under Section 841(a)(1).

⁴There was also substantial evidence that petitioner failed to keep adequate records and falsified records to conceal substantial discrepancies in inventories of controlled substances. These actions formed the basis of his convictions on Counts 5, 6, and 8. In addition, he falsified his accounts after the DEA investigation of his operations began; this action formed the basis of his conviction for obstruction of justice (Count 9). Petitioner does not challenge these convictions in this Court.

But *Moore* makes it plain that the "activities of registered physicians are [not] exempted from the reach of §841 simply because of their status." 423 U.S. at 131-132. Physicians are subject to prosecution for violating Section 841 to the extent that they "exceed[] the bounds of 'professional practice.'" 423 U.S. at 142. In any event, *Moore* was a case in which the controlled substance was being dispensed by the defendant himself, who claimed he was doing so in the course of his medical practice. Here, on the other hand, it is undisputed that Biscardi was not a physician, yet was engaging in the illegal possession and distribution of controlled substances. Assisting an individual known to be unlicensed and unregistered in that individual's criminal distribution of amphetamines⁵ is in no manner an aspect of the "professional practice" of medicine. Petitioner's actions, accordingly, did not fall within the exception contained in 21 U.S.C. 841 for activities "authorized by this subchapter" (see 423 U.S. at 138-143), and petitioner was properly convicted for aiding and abetting Biscardi's violations of 21 U.S.C. 841(a)(1).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.
Solicitor General

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⁵Petitioner does not contest Biscardi's liability under Section 841(a)(1), nor that he hired Biscardi, held him out to the public as a physician, and provided him with office space and prescription forms.